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SECRETARY, BOARD OF
OIL, GAS & MINING

BEFORE THE BOARD OF OIL, GAS AND MINING
DEPARTMENT OF NATURAL RESOURCES
STATE OF UTAH

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IN THE MATTER OF THE REQUEST	:	MEMORANDUM IN OPPOSITION
FOR HEARING OF THE APPEAL OF	:	TO APPEAL OF AGENCY ACTION
AGENCY ACTION TO ENFORCE	:	
VIOLATED MINERALS RULES, UTAH	:	
BUILDING STONE SUPPLY, GROUSE	:	DOCKET NO. 97-007
CREEK OPERATIONS, BOX ELDER	:	CAUSE NO. M/003/031
COUNTY, UTAH.	:	

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The Division of Oil, Gas and Mining ("the Division"), by and through its counsel, respectfully files its Memorandum in Opposition to Appeal of Agency Action to Utah Building Stone Supply's application for Board review of the Division's decision to require the filing of an approved Notice of Intention to Commence Large Mining Operations pursuant to the requirements of R647-4-101 from Utah Building Stone Supply. In addition, the Division has determined that Utah Building Stone Supply is in violation of rules R647-3-113 and R647-4-107.6 (failure to conduct contemporaneous reclamation).

INTRODUCTION

The Grouse Creek Quarry is located in portions of Sections 2, 3, 4, 10, and 11, Township 12 North, Range 17 West; and Sections 34 and 35, Township 13 North, Range 17 West, Salt Lake Base Meridian, Box Elder County, Utah. The quarry owner is Utah Building Stone Supply ("UBSS") which is owned and operated by William Bown. William

Bown's father, Preston Bown is active in the running of the operation.

The Division notes the deficiencies in petitioner's Request for Agency Action. (EXHIBIT D). These include failure to make a statement of the legal authority and jurisdiction under which Board action is requested which is required by R641-104-133.500. Additionally, petitioner has failed to comply with R641-104-133.100, which requires the names and addresses of all persons to whom a copy of the Request for Agency Action is being sent; and R641-104-200 which mandates the form of a Request for Agency Action; as well as numerous less important requirements of the Board's procedural rules. However, the Division has chosen to respond as if a valid Request For Agency Action has been filed, in the event the Board chooses to hear the case despite the inadequacies of the filed document. In light of the brevity of petitioner's document, the Division has included a comprehensive history of the mine.

STATEMENT OF THE CASE

UBSS has operated a large mining operation ("LMO") without approval of its Notice of Intention as required by Utah Code § 40-8-13 and R647-4-101. The other violations cited by the Division, R647-3-113 (mine enlargement) and R647-4-107.6 (practices and contemporaneous reclamation) are related to this violation. The Division gave UBSS the option of reclaiming to small mine status in order to alleviate the first violation. While William Bown as owner and operator of UBSS agreed to this option, he has since reneged which resulted in the violations of R647-3-113 and R647-4-107.6. Consequently, the

Division ordered UBSS to cease operations until it had an approved Notice of Intention as required by law. That order was appealed by UBSS and an informal hearing was held which upheld the Division order. UBSS has appealed the decision.

STATEMENT OF THE FACTS

1. On February 17, 1995, the Division receives a copy of the Notice to Conduct Mining Operations from the Bureau of Land Management ("BLM") that identifies 11.6 acres of existing and proposed disturbance. The Division requests information necessary to permit as an LMO. (EXHIBIT A (chronology for facts 1-25)).

2. On July 6, 1995, the Division conducts a joint site inspection with the BLM and the operator. The parties schedule a July 20, 1995 meeting to discuss plans and maps. The Bowns agree to reclaim 2.8 acres by October 31, 1995, to reduce liability.

3. On July 20, 1995, the joint meeting is held in the Division's offices. A map is prepared showing 11.53 acres of current and proposed disturbance. The Bowns agree to submit an LMO Notice of Intention by September 5, 1995.

4. On November 6, 1995, the Division issues a Notice of Non-Compliance to the Bowns for its failure to file a Notice of Intention to commence an LMO, as required by the Utah Mined Landed Reclamation Act, Title 40-8-13(1) et seq. and the Minerals Reclamation Program Rules R647-1 through R647-5.

5. On November 27, 1995, The Bown's Notice of Intention to Conduct an LMO is submitted to the Division. The notice listed the equipment to be used in the operation as

including "six wheel drive and four wheel drive shuttle trucks, track excavator, D-8 dozer, 18 wheeler w/trailer, 10 wheel dump truck, 933 front loader." (EXHIBIT B).

6. On December 11, 1995, the operator met with the Division indicating that they had found a surety company to post the required bond. Bonding forms were given to the operator at this time.

7. On December 20, 1995, the Division sends the Bowns a letter outlining status of the non-compliance. The operator is given sixty days to post an interim \$25,000 reclamation surety bond which is due February 26, 1996.

8. On January 30, 1996, the initial LMO review comments are sent to the operator.

9. On February 7, 1996, the Division receives a letter from the Bowns protesting the amount of the disturbed area (acreage) identified as being associated with this project.

10. On February 14, 1996, the Division, BLM, and the Bowns meet at the Division to discuss plan review and the February 7, 1996 letter. The Division agrees to re-evaluate roads later in the year when site is accessible and to suspend further action on the Notice of Non-Compliance until the road issue is resolved.

11. On June 5, 1996, a joint Division and BLM site inspection is conducted to resolve the road issue. During the inspection 8.73 acres of existing road is identified as mine access for which the operator has reclamation responsibility. The Bowns re-evaluate the existing roads and identify sufficient sections that could be reclaimed and still allow them access to the quarry areas. Reclaimed roads would reduce the acreage to 4.8 acres (4.31 acres to be reclaimed).

12. On June 18, 1996, the Division sends a letter to the operator establishing a July 31, 1996 deadline to perform the reclamation of the 4.31 acres, or post a revised \$6,500 interim surety amount to mitigate the November 6, 1995 Notice of Non-Compliance. Revised color-coded topographic map is attached showing and labeling all roads discussed during June 5, 1996 inspection. The operator is reminded that the Grouse Creek Quarry would be in non-compliance until the operator reclaimed to five or less acres, or permitted and bonded as an LMO. The Division requested a written response of operator's preferred intentions by July 1, 1996.

13. On July 25, 1996, William Bown calls the Division requesting a couple of additional days to perform the required reclamation of the 4.31 acres. He also indicates that they are not in a position to post the interim reclamation surety.

14. On August 6, 1996, a site inspection conducted by the Division concludes that no reclamation has occurred through efforts of the Bowns. However, approximately 0.67 acres has been reclaimed through natural processes. This leaves 8.04 acres of disturbance.

15. On August 13, 16, 19, 22, 26 and September 3, 1996 the Division makes repeated calls to the Bowns. Messages are left on the Bown's answering machine instructing them to contact the Division.

16. On September 3, 1996, after sending a fax message to contact the Division, the operator calls and states that they have arranged to have their bulldozer transported to the Grouse Creek Quarry area during the week of September 16, 1996. Once it is there, it would only take a day or two to complete the required reclamation.

17. On September 23, 1996, the Division conducts a site inspection and finds that no reclamation work has been performed. Operator indicates that the bulldozer is in the shop for repairs and would be delivered to the site by the end of the week.

18. On September 30, 1996, the operator calls the Division indicating that the bulldozer was ready to go and that the reclamation would be completed by the end of the week. Operator advised to call the Division as soon as the work is completed.

19. On October 21, 1996, the Division attempts to contact operator by phone to discuss the status of reclamation work. The Division is unable to reach the operator.

20. On October 23, 1996, the Division conducts a site inspection which shows that no reclamation work had been performed at the site. Additionally, the bulldozer is not observed at the site.

21. On November 14, 1996, a site inspection conducted by the BLM shows that no reclamation work has been performed and that no equipment exists on-site.

22. On January 21, 1997, the Division issues a Notice of Agency Action to Enforce Violated Mineral Rules. The violated mineral rules include R647-3-113 (enlargement of small mine to large mine acreage without approved Notice of Intention), R647-4-101, (requirement that a Notice of Intention must be approved by the Division before mining operations begin) and R647-4-107.6 (requirement for concurrent reclamation). UBSS directed to suspend all mining activities until an LMO Notice of Intention is approved.

23. On January 21, 1997, the Division receives the first annual report submitted for this site.

24. On February 3, 1997, the Division receives a written appeal of the Notice of Agency Action from the operator.

25. On February 12, 1997, the Division sends a letter formally notifying operator of the scheduled February 27, 1997, informal hearing date. A previous telephone contact with the operator confirmed the acceptability of the proposed hearing date.

26. On February 27, 1997, the informal hearing is held at the Division.
(EXHIBIT C).

27. On March 25, 1997, the Division Director, Jim Carter rules against UBSS, represented by the Bowns. (EXHIBIT C).

28. On April 1, 1997, UBSS appeals the March 25, ruling. (EXHIBIT D).

ARGUMENT

I. Casual Use Is a Term of Art. Under BLM Regulations the Term Does Not Have Legal Significance Under the State Program

UBSS' appeal is primarily based on a claim of "casual use". The term "casual use" is a term of art under BLM regulations. 43 C.F.R. § 3809.0-5 (1996). However, it does not have legal significance under the Utah regulatory scheme. Moreover, the BLM's enforcement officers have not found that UBSS' operations meet the definition of "casual use".

In essence, UBSS has been charged with operating an LMO without an approved Notice of Intention. The proper test to determine whether an LMO exists under State law is

to first determine whether a mining operation exists and then determine whether the operation has disturbed more than five acres. Utah Code § 40-8-13 requires the filing of a Notice of Intention prior to commencement of mining operations. Utah Code § 40-8-13 (1996). Utah Code § 40-8-14 requires the filing of a surety for any mining operation "prior to the commencement of operations" unless it is exempt from the requirement because it is a small mine operation. Utah Code § 40-8-14 (1996). Section 40-8-4(15) states, "'small mining operations' means mining operations which disturb or will disturb five or less surface acres at any given time." Utah Code § 40-8-4(15) (1996). The Division has determined that UBSS has operated an LMO without an approved Notice of Intention or a surety as required by Sections 40-8-13 and 40-8-14 of the Utah Code.

The first question, whether mining operations are occurring, can be answered by examining §§ 40-8-4(8)(a) which states:

"Mining Operation" means those activities conducted on the surface of the land for the exploration for, *development of*, or *extraction* of a mineral deposit, including, but not limited to, surface mining and the surface mining effects of underground and in situ mining, on-site transportation, concentration, milling evaporation, and other primary processing.

Utah Code § 40-8-4(8) (a) (1996).

Under § 40-8-4(4):

"Development" means the work performed in relation to a deposit following its discovery but prior to and in contemplation of production mining operations, aimed at, but not limited to, preparing the site for mining operations, defining further the ore deposit by drilling or other means, conducting pilot plant operations, *constructing roads* or ancillary facilities, and other related activities.

Utah Code § 40-8-4(4) (1996) (emphasis added).

Thus, the construction of roads is considered as conducting "mining operations." If the Division proves road construction, UBSS would be developing a mining operation and conducting mining operations under the law. The Division asserts that UBSS has constructed roads at the site in three manners. First, UBSS' owners and employees have admitted using earth moving equipment to construct portions of the roads. Second, the heavy truck traffic removing the stone has both created new roads and enlarged existing roads. Finally, UBSS has used some roads as work areas, by parking equipment on them and loading their trucks directly from the mining areas. Consequently, the road building activity alone would mean that UBSS has conducted "mining operations" at the site. However, UBSS is conducting mining operations in another manner as well. UBSS is removing significant amounts of quartzite rock from the site and is therefore engaged in extraction as defined by § 40-8-4(8)(a). Utah Code § 40-8-4(8)(a) (1996).

In sum, the first part of the test for conducting a mining operation is satisfied. UBSS is conducting a mining operation at the Grouse Creek Quarry.

The second part of the test for an LMO is whether the operations have disturbed or affected more than five acres. Under the Mining Rules and the Utah Mined Land Reclamation Act disturbed and affected are synonyms. See Larson Limestone v. Division of Oil , Gas & Mining, 903 P.2d. 429, 431 (Utah 1995). Under § 40-8-4(7):

"Land affected" means the surface and subsurface of an area within the state where mining operations are being or will be conducted, including but not limited to:
(a) on-site private ways, roads, and railroads; (b) land excavations; (c) exploration

sites; (d) drill sites or workings; (e) refuse banks or spoil piles; (f) evaporation (g) stockpiles; (h) leaching dumps; (i) parking, storage, or waste discharge areas (j) tailings ponds or dumps; and (k) work, parking, storage, or waste discharge areas, structures and facilities. All lands shall be excluded that would otherwise be includable as land affected but which have been reclaimed in accordance with an approved plan or otherwise, as may be approved by the board, and lands in which mining operations have ceased prior to July 1, 1977.

Utah Code § 40-8-4(7) (1996).

The Division and the BLM have concluded that more than five acres of disturbance exists at the site due to road construction alone. As of the last inspection, 8.04 acres of disturbance exists. (EXHIBIT E). The talus (quartzite) slopes are approximately 10 to 15 acres for a total of 18.04 to 23.04 acres. The Division has excluded the talus slope areas from the disturbed areas in prior calculations because they will probably require no reclamation. However, the exclusion is not legally required. In fact, the disturbed area can be greater than the area to be reclaimed. Legally, since the removal of rock will cause "significant surface resource disturbance" it should be included in the disturbed area. The appearance of the area will be significantly altered over time.

Clearly, the mine site exceeds the number of acres required by § 40-8-4(15) to meet the small mine operation. Both the Division and the BLM, acting pursuant to a Memo of Understanding ("MOU") have carefully excluded all roads that have a primary purpose unrelated to the mine. (EXHIBIT F). Because the mine is located primarily on BLM land, the BLM is the lead agency on the project pursuant to the MOU. Thus, the Division has worked closely with the BLM on evaluating the Grouse Creek Project. William Bown met with both the BLM and the Division to determine which roads should be included in the

mine's disturbed area. At that meeting, William Bown agreed with the final estimate of disturbed area. (EXHIBIT G). Moreover, he promised the Division to post a surety bond based on all the roads in the Division's estimate being reclaimed. Id. Finally, when he failed to post the surety bond as promised, he then promised to reclaim down to five acres. He met with the Division and BLM to identify roads for reclamation that would allow them to obtain small mine status and agreed to reclaim to small mine status. He has repeatedly violated commitments to conduct this reclamation. (EXHIBITS A, H, I, and J). Relying on these assertions, the Division has wasted resources inspecting the mine site only to find that the promised work has not been performed.

William and Preston Bown now claim that the roads involved in their operation are "public prescriptive easements" and cannot be reclaimed by them. Because of that, they believe the roads should be excluded from their disturbed area. The Bowns do not make clear what they mean by public prescriptive easement. Many of the roads exist on BLM land. As a matter of law, one cannot receive a prescriptive easement to land owned by the federal government. Tripp v. Bagley, 276 P. 912, 919 (Utah 1928). (EXHIBIT K). Consequently, if the Bowns are asserting a true prescriptive easement, that claim must fail.

However, the Bowns may be asserting that an R.S. 2477 claim has been created under Section 27-16-101 which they claim would exclude the road from its disturbed area. Utah Code § 27-16-101 (1996). That claim must fail for two reasons. First, in order for an R.S. 2477 road to be created, the road must have been in existence and accepted by the state or a political subdivision prior to October 21, 1976. Utah Code § 27-16-101 (1996). The

Division and the BLM have found no evidence that any of the roads included in the disturbed area have been accepted by the state or a political subdivision prior to October 21, 1976. One way to demonstrate acceptance is to show the "inclusion of the highway in a state, county, or municipal road system[.] Utah Code § 27-16-102(1)(ii) (1996). The Division or the BLM have examined county maps and cannot find any public roads in the disturbed area. Moreover, the Bowns (representing UBSS) have not provided the Division with any evidence that roads in the disturbed area have been accepted by the state, county or any other subdivision. They have pointed out that other people are using the roads. However, this Board and the Utah Supreme Court have rejected the argument that use of a road by a party other than the operator will result in the road being excluded from a disturbed area. Larson Limestone v. Division of Oil, Gas & Mining, 903 P.2d 429, 431 (Utah 1995). (EXHIBIT L).

The second reason the claim must fail is that the mere fact that an area does not have to be reclaimed would not exclude it from the disturbed area. The definition of "land affected" or disturbed under § 40-8-6 "means the surface and subsurface of an area within the state where mining operations are being or will be conducted, including, but not limited to: (a) on-site private ways, roads, and railroads;[excluding lands] in which mining operations have ceased prior to July 1, 1977". Utah Code § 40-8-6 (1996). Thus, on-site roads are part of a disturbed area despite their private or public status. On-site is defined under § 40-8-6(11) as: "'On-site' means the surface lands on or under which surface or underground mining operations are conducted. A series of related properties under the

control of a single operator but separated by small parcels of land controlled by others will be considered a single site unless excepted by the division." Utah Code § 40-8-4(11). Thus, if mining operations are occurring in an area, the area is considered to be on-site. Under § 40-8-4(8), mining operations include on-site transportation. Thus, the moving of talus around the site would make the road part of the disturbed area whether or not the road was public or private. Thus, under the facts of the case, UBSS is operating an LMO regardless of whether the roads are private or public. Either type should be included the mine's disturbed area.

Requiring a road that may be public to be included in the disturbed area of a large mine and despite the fact the Division would not order its reclamation makes sound policy sense. A surety bond is required for the disturbed areas of a large mine. This is done to prevent the public from assuming a risk that the mine will not be reclaimed. Public roads can be abandoned under § 27-12-90. Utah Code § 27-12-90 (1996). In fact, Box Elder County is in the process of abandoning many of the roads that the Division has identified as public in the area and excluded from the disturbed area map.

Thus, there is the risk that a public road in a mine site could become a private road and subject to reclamation. Under that circumstance the public assumes the risk that the surety bond will be inadequate to cover a road that has to be reclaimed. Of course, the risk of a public road becoming a private road is much greater when the operator projects closure at a distant date. This has occurred in the present case. UBSS has the Division a closure date of 2,200 A.D... (EXHIBIT B) The Division has no way to know the probable status of

a road so far in the future. Thus, it must bond for all possibilities. While the Division believes that all roads in the disturbed area are not public roads, given the closure date it would be proper to require surety.

CONCLUSION

Under the proper test, UBSS has operated a large mine without an approved Notice of Intention. The Division has shown that mining operations were occurring at the site and that the operation had disturbed more than five acres. Therefore, the Board should uphold the Division's order that no extraction of resource occur at the site until UBSS possesses an approved Notice of Intention.

DATED this 18th day of April, 1997.

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